Office - Supreme Court, U.S.
FILED
JUN 11 1982
ALEXANDER L. STEVAS,
CLERK

81-2289

No. 81-2083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ITT CONTINENTAL BAKING COMPANY, INC., et al.,
Petitioners,

vs.

WILLIAM INGLIS & SONS BAKING CO., et al.,
Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 11, 1982

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QUESTIONS PRESENTED

1. If no legal error is committed in the presentation of evidence and instructions to a jury during a four-week trial, do the Constitution or principles of sound judicial administration preclude a trial judge from awarding a redundant new trial wherein the same evidence and the same instructions will be presented to a second jury merely because the trial judge believes the first jury's verdict was against the weight of the evidence?

2. Pursuant to its supervisory responsibilities over the federal judiciary, should this Court occasionally review a trial record to ensure the Constitutional right to a jury trial is not being negated by district judges who disagree with jury verdicts.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Sunlite Baking Company, Inc., a subsidiary of William Inglis & Sons Baking Co., is a party to this proceeding.

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VS.

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Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross-petitioner William Inglis & Sons Baking Company respectfully prays that a Writ of Certiorari be issued to review the modified judgment of the Court of Appeals for the Ninth Circuit entered on February 10, 1982.

JURISDICTION

This is a cross-petition filed pursuant to Rule 19.5. Petitioner's petition was filed in this Court on May 11, 1982 and was received by cross-petitioner's counsel on May 14, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

OPINIONS BELOW

The modified opinion of the Court of Appeals reversing the District Court's judgment n.o.v., but affirming the order granting a new trial, is reported at 668 F.2d 1014. It is attached as Appendix A to petitioner's petition. The District Court opinion is reported at 461 F.Supp. 410 and is annexed as Appendix C to petitioner's petition. Citations to the lower courts' opinions in this cross-petition are to those appendices.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CROSS-PETITION

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury should be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The California Unfair Practices Act, in Section 17043 of the California Business and Professions Code, provides:

> It is unlawful for any person engaged in business within this state to sell any article or product at less than the cost thereof to such vendor, or give away any article or product for the purpose of injuring competitors or destroying competition.

Section 17026 of the California Business and Professions Code provides in pertinent part:

> "Costs" as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer.

Section 17029 of the California Business and Professions Code provides:

> "Cost of doing business" or "overhead expense" means all costs of doing business incurred in the conduct of the business and shall include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest of borrowed capital, depreciation, selling costs, maintenance of equipment, delivery costs, credit losses, all type of licenses, taxes, insurance and advertising.

Section 17071 of the California Business and Professions Code provides:

> In all actions brought under this chapter proof of one or more actions of selling or giving way any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition.

Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Robinson-Patman Act, amending Section 2(a) of the Clayton Act (15 U.S.C. § 3(a)), provides in pertinent part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either di-

rectly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .

COUNTER-STATEMENT OF THE CASE

After seven years of discovery, this action was tried to a jury for four weeks. Plaintiff/cross-petitioner William Inglis & Sons Baking Company ("Inglis") had alleged in its amended complaint that defendant ITT Continental Baking Company ("Continental") had violated state and federal law by charging discriminatory and below cost prices for its one-pound loaf of "private label" white pan bread with the purpose and effect of driving small wholesale bakers such as Inglis out of business.

In Northern California and other "problem areas," Continental's sales of Wonder Bread (its higher-priced and more profitable advertised brand) were declining due to the widening spread in prices between advertised label and private label bread. (RT 176, 319, 505-6, 2013, P-244). Continental therefore directed its consulting firm, McKinsey & Company, to develop a plan to combat independent private label wholesale bakers such as Inglis. The initial McKinsey Report, issued September 7, 1971, included a

strategy euphemistically designed "to hasten wholesaler exit." (P-114) During subsequent meetings, Continental's officers instructed McKinsey to study the feasibility of Continental holding or decreasing its private label prices for four or five years, absorbing all cost increases and thereby driving smaller private label wholesalers from the market.[1] McKinsey was told to develop means of implementing such a pricing strategy. (RT 3823-5; 3908-11)

The final McKinsey Report, dated October 22, 1971, presented a definitive plan to "hold the price."[2] It stated that Continental "must compare itself to its competitors in terms of its current financial strength and either its capability for holding or reducing costs or its willingness to absorb future cost increases by accepting lower profits." The objective was plainly stated: "The outcome of this strategy would be an acceleration in the shake-out of marginal bakers . . ." (P-116, p. MK 187, App. E at 2) The report noted that in the past Continental had benefitted from the "attrition" of wholesale bakers; Continental could pick off troublesome competitors by initiating price reductions "on a market by market" basis and thereby realize the benefits of increased concentration.

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[1]One Continental official opined that if Continental were unable to substantially reduce expenses the *only* way to reduce the price spread between advertised and private label bread was for Continental to forego profits until its competitors went out of business (P-113, p. MK 717).

[2]Portions of the October McKinsey Report are attached hereto as Appendix E, so designated as not to cause confusion with the appendices A-D filed with Continental's petition.

There can be no question that Continental decided to adopt and implement this predatory pricing strategy in Northern California. Throughout the early 1970s, Continental sold its private label bread below cost and absorbed $5,200,000 in losses. (RT 211) Despite unprecedented escalating costs, Continental continually reduced its prices for private label bread. During Inglis' last year of business, Continental made a special effort to take Inglis' major accounts with below cost prices. (P-73, P-260A, P-238, P-242, P-243, RT-320) Eventually, after years of sustained below-cost sales, Continental succeeded in driving Inglis and other competitors from the market. Inglis went out of business altogether in 1976.[3] Only two full-service wholesale bakers were left in Northern California, Continental and Campbell-Taggart, Inc.

A. State Law Claim

Inglis' state law claim was based upon the California Unfair Practices Act.

California law prohibits the sale of goods below the average total cost of production for the purpose of "in-

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[3]On the hearing for preliminary injunction, the district court found that "competition is being smothered in this market" but, nonetheless, denied equitable relief. That order, reported at 389 F.Supp. 1334, 1347 (N.D. Cal. 1975), was reversed by the Ninth Circuit in *Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975), but too late to save Inglis' business from destruction. The district court conducted no further proceedings and issued no further order concerning the preliminary injunction motion following the reversal, Inglis' plant was closed by action of its creditors and the corporation became the subject of proceedings under the Bankruptcy Act.

juring competitors or destroying competition." Cal. Bus. & Prof. Code §§ 17043, 17026, 17029. Both the District Court and the Court of Appeals recognized that Inglis had demonstrated—indeed, that Continental had admitted (RT 61)—sales of white pan bread by Continental below its average total cost. App. at C7, 461 F.Supp. at 423; App. at A25, 668 F.2d at 1035. Proof of such below-cost sales, together with proof of their injurious effect upon Inglis, created a presumption that Continental intended to injure its competitors or destroy competition in violation of § 17043. Cal. Bus. & Prof. Code § 17071; App. at A55-6, 668 F.2d at 1049 n.61. This statutory presumption was buttressed by the substantial evidence of Continental's predatory intent described above. See pp. 4-6, *supra*.

As the Court of Appeals acknowledged, Inglis presented sufficient evidence to the jury to establish a *prima facie* violation of the California Unfair Practices Act by Continental. App. at A58, 668 F.2d at 1050 n.64. The burden was therefore upon Continental to establish an affirmative defense to avoid liability. *People v. Gordon*, 105 Cal.App.2d 711 (1951). Continental attempted to do so. Continental tried to convince the jury that its below-cost sales were "an endeavor made in good faith to meet the legal prices of [a] competitor selling the same article or product, in the same locality or trade area . . ." Cal. Bus. & Prof. Code § 17050(d). The jury received the parties' evidence and the Court's instructions on the "meeting competition" defense without objection from Continental. RT 5327-32. As the trier of fact, the jury rejected Continental's proffered excuse for its below-cost sales. Instead, the jury returned a

verdict for Inglis on its state law claim, as well as its claims under Sherman Act § 2 and Robinson-Patman Act § 2(a).[4]

Continental moved for an order granting judgment n.o.v. or, in the alternative, an order granting a new trial. With respect to Inglis' claim under the California Unfair Practices Act, the District Judge acknowledged the parties' evidence on the "meeting competition" issue differed sharply and denied the motion for judgment n.o.v. However, the District Judge granted Continental a new trial on the state law claim because, in his opinion, "the weight of the evidence establishes that the defendant maintained these below-cost prices in a good faith response to competition." App. C at C18-19, 461 F.Supp. at 423. In denying Continental's appeal that it should have been granted judgment n.o.v. on the Unfair Practices Act claim, the Ninth Circuit likewise held the "meeting competition" defense to Inglis' state law claim had to be resolved by a jury. App. A at 52, 668 F.2d at 1047-48. Nevertheless, the Court of Appeals denied Inglis' request for reinstatement of the jury verdict on the state law claim and remanded the case for a new trial. App. A at 57-8, 668 F.2d at 1050.

Although both lower courts agreed the validity of the parties' claims and defenses under the California Unfair Practices Act must be determined by a jury, neither court was willing to accept the jury's decision after it had heard

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[4] The state law claim does not involve the appropriate legal standard for assessing claims of predatory pricing under the federal antitrust laws. As the Court below held, the federal antitrust statutes have not pre-empted the law of California regarding unfair trade practices. App. at A53-57, 668 F.2d at 1048-50. Neither party is seeking a review of that holding by this Court.

all of the evidence and received appropriate instructions. Disagreeing with the unanimous opinion of six impartial jurors and disregarding the substantial evidence upon which the collective opinion was based, the District Court felt "the weight of the evidence" established that Continental's below-cost prices were a good faith response to competition and ordered a new trial. App. C18-19, 461 F.Supp. at 423. No other reason was or could be given for the grant of a new trial on Inglis' state law claim. The panel of the Court of Appeals also applied a "weight of the evidence" standard of review and, not wishing to interfere with the trial judge's exercise of his discretion, affirmed the new trial order. App. at A57-8, 668 F.2d at 1050. The parties are now preparing to re-try the case to a second jury.

B. Federal Law Claims

Sherman Act § 2 prohibits pricing which is predatory. The Robinson-Patman Act § 2(a) prohibits pricing which is discriminatory when such pricing may substantially lessen competition or tend toward monopoly. The jury found that Continental's prices were both predatory and discriminatory and rejected the defense that Continental's prices were a good faith response to competition.

The district court disagreed with the jury and granted Continental's motion for judgment n.o.v. on Inglis' federal claims or, in the alternative, a new trial. The Court of Appeals reversed the judgment n.o.v. and held that although a price "below average total costs and above average variable costs is not inherently predatory, it does not follow however, that such prices are never predatory"

under Sherman Act § 2. App. A at 27, 668 F.2d at 1035. The Court of Appeal further held that if Inglis could prove that the anticipated benefit of Continental's below-cost prices depended on their "tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses", attempted monopolization would be a proper jury finding. App. A at 27, 668 F.2d at 1035. Inglis met that burden in the first trial: fairly viewed, the evidence showed that Continental's motive in charging below-cost prices was expressly to eliminate its rivals and to create a concentrated market structure. P-113, P-114, P-116, App. E.[8]

The court below also held that although predatory pricing required by Sherman Act § 2(a) was not always necessary to prove the competitive injury requirements of Robinson-Patman § 2(a), Inglis failed to present evidence that would otherwise fulfill that requirement. App. at A40, 668 F.2d at 1042. Contrary to the Court of Appeals' holding, however, the record contained undisputed evidence which established an adverse effect on competition: during the period that Continental charged discriminately low prices in Northern California, the number of white pan

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[8] While Continental's business plan was couched in such innocuous phrases as "hasten wholesaler exit," "attrition," and "acceleration of shake out of marginal bakers," the jury easily saw through these transparent euphemisms. The jury received substantial evidence from Continental's officials in Northern California that Continental endeavored to eliminate its competitors so as to gain more shelf space for Wonder Bread sales and that Continental actually prepared contingency plans to take full advantage of the expected "wholesaler exits" from the market. RT 310-13, 320, 1893-8, 1902-5, 1916-8, 1927-9; P-239, P-241A, P-244.

bread producers in that market fell from five to two with only the two largest, Campbell-Taggart and Continental, remaining. It would be difficult to present more persuasive evidence that competition was adversely impacted.

Inglis petitions this Court to grant certiorari to resolve a conflict among the Circuits with respect to the appropriate standard of review for orders granting a new trial on the grounds the jury verdict is against the weight of the evidence, to establish a standard that comports with the Seventh Amendment and to establish a review procedure to insure that lower courts comply with such a standard.

REASONS FOR GRANTING THE WRIT

1. There Is a Split Among the Circuit Courts of Appeal Regarding the Proper Standard of Review to be Applied Under the Seventh Amendment to Motions for a New Trial on the Grounds the Verdict Was Against the Weight of the Evidence

The Seventh Amendment to the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law." This Court described the respective roles of judge and jury under the Seventh Amendment in *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1943):

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclu-

> sions that which it considers most reasonable. [citations omitted.] That conclusion, . . . cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (emphasis added)

See also Basham v. Pennsylvania Railroad Co., 372 U.S. 699, 700-01 (1963); *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 363-4 (1962) (error for trial and appellate courts to "reevaluate the conflicting evidence and mandate a result opposite from that reached by a jury.") In derogation of the Seventh Amendment and these well-reasoned precedents, the Ninth Circuit Court of Appeals permits and encourages its trial judges to reweigh the evidence presented to juries and to grant a motion for a new trial solely upon his or her opinion that a jury verdict was "against the weight of the evidence." *See, e.g., Inglis, supra*, 668 F.2d at 1050; *Fount-Wip, Inc. v. Redi-Whip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978); *Minthorne v. Seeburg Corp.*, 397 F.2d 237, 244 (9th Cir. 1968); *Anglo-American General v. Jackson National Life Ins. Co.*, 83 F.R.D. 41, 43 (N.D.Cal. 1979).[6]

Consistent with this Court's recognition of the jury's role under the Constitution, several Courts of Appeal have

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[6]The Circuit's disregard of juries' verdicts cannot be reconciled with its admiration for their "collective intelligence, wisdom and dedication to their tasks . . ." *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 429-31 (9th Cir. 1979) ("While we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case.")

limited the discretion of their district judges to order new trials on such flimsy grounds as the verdict being "against the weight of the evidence." This line of authority may be traced to the thoughtful *en banc* decision of the Third Circuit in *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir. 1960), *cert. den.*, 364 U.S. 835 (1961):

> "But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action affects a denigration of the jury system and to the extent the new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as a trier of facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than in a case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigant's right to a jury trial."

The stringent *Lind* approach to new trial motions is consistent with the decisions of this Court and it has been expressly adopted by the District of Columbia Circuit, First Circuit, Third Circuit, Fifth Circuit, Sixth Circuit, and Eighth Circuit.[7] The Ninth Circuit has refused to

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[7] *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 n.13 (D.C. Cir. 1969), *cert. den.*, 396 U.S. 835 and *Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978), *cert. den.*, 441 U.S. 910; *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978); *O'Neil*

follow the *Lind* trend and grants its district judges virtually unlimited discretion to overrule any jury verdict with which they disagree.

Inglis submits this Court should grant *certiorari* to resolve a clear split among the circuits on an elementary, but important, question of civil procedure, *i.e.*, the appropriate standard of review for a new trial motion. Inglis further submits this Court should endorse the *Lind* approach: appellate courts should be instructed to vacate new trial orders where—as here—the trial judge, in violation of the Seventh Amendment, has encroached upon the province of the jury by reassessing the credibility of the witnesses and reweighing the parties' conflicting evidence.[8] A new trial should be permitted only to prevent a "miscarriage of justice" not because the trial judge would have reached different results from that reached by the jury. *See Rios v. Empress Lines Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978); *Aalco Wrecking, supra*, 466 F.2d at 187.

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v. W.R. Grace & Co., 410 F.2d 908, 914-15 (5th Cir. 1969); *Duncan v. Duncan*, 337 F.2d 49, 52-53 (6th Cir. 1967), *cert. den.*, 389 U.S. 913; *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 185-8 (8th Cir. 1972), cert. denied, 410 U.S. 930. Other circuits have on occasion embraced an equally strict standard of review. *See, e.g., Continental Airlines, Inc. v. Wagner-Moorehouse, Inc.*, 401 F.2d 23, 30 (7th Cir. 1968); *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1260 (10th Cir. 1979), *rev'd on other grounds*, 449 U.S. 33 (1980).

[8]Even in those circuits where *Lind* has been adopted, the courts occasionally stray and apply the "weight of the evidence" standard of review. *See e.g., Bazile v. Bisso Marine Co.*, 606 F.2d 101, 105 (5th Cir. 1979); *Lincoln Carpet Mills v. Singer Co.*, 549 F.2d 80, 81 (8th Cir. 1977). Clearly, a uniform rule is necessary.

2. The Court of Appeals Decision Affirming the Grant of Continental's Motion for New Trial Clashes with Principles of Efficient Judicial Administration

The *Lind* standard of review for new trial motions is not only sound as a matter of Constitutional doctrine but also as a matter of practical judicial administration. If an appellate tribunal determines that no legal error was committed in the presentation of a claim and defense to a jury—*e.g.*, Inglis' Unfair Practices Act claim in this case—no useful purpose is served by presenting the same evidence and the same instructions to a second jury merely because the trial judge disagreed with the first jury's verdict. *Aalco, supra*, 466 F.2d at 187; *O'Neil, supra*, 410 F.2d at 915. See, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-9 (1971) (public policy against relitigation of same issues.) In such instances, a second, costly jury trial not only denigrates the jury system but further delays justice for other litigants on the overcrowded dockets of the district courts.

Both of the courts below clearly held that reasonable minds could draw differing conclusions from the evidence on the "meeting competition" issue and that a jury could properly find for Inglis on its state law claim. App. at A52, 668 F.2d at 1047-8; App. at C19, 461 F.Supp. at 423. Resolution of this question of fact *must be*, and *will be* made by a jury. That being so, no "miscarriage of justice" resulted from the first trial simply because the jury found Inglis' evidence more persuasive than Continental's. A second trial would be a burdensome, unnecessary, four-week repeat presentation of the same evidence to another jury

simply to obtain another verdict.[9] The law should not abide a procedural rule which allows such a needless waste of public and judicial resources and which derogates cherished Seventh Amendment rights. *See Blonder-Tongue, supra,* 402 U.S. at 328-9.

Accordingly, as the body responsible for the efficient administration of justice in a federal court system with limited resources, this Court should take this opportunity to invigorate the Seventh Amendment and instruct the lower courts that under the Amendment only one error-free trial is necessary or appropriate. The Court should announce that it considers it an abuse of discretion for district judges to negate jury verdicts which—like Inglis' verdict—are free of legal error and reasonably supported by the record; appellate courts should be encouraged to reinstate jury verdicts which are overturned on the grounds they are "against the weight of this evidence."[10]

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[9]*See Duncan, supra,* 377 F.2d at 55; *O'Neil, supra,* 410 F.2d at 915; *Aalco, supra,* 466 F.2d at 187-8; *Moore, supra,* 491 F.2d at 301.

[10]Several courts, including the Ninth Circuit, have recognized that in light of the Seventh Amendment, judges should validate a jury verdict whenever possible. *See, e.g., Atlantic & Gulf Stevedores, supra,* 369 U.S. at 364; *Gaspard v. Taylor Diving & Salvage Co.,* 649 F.2d 372, 374 (5th Cir. 1981); *Angle v. Sky Chief, Inc.,* 535 F.2d 492, 494 (9th Cir. 1976); *Guidry v. Kevy,* 598 F.2d 402, 406 (5th Cir. 1979); *Borgue v. Diamond M Drilling Co.,* 623 F.2d 351, 353 (5th Cir. 1980).

The trial judge's new trial order was overturned in *Vander Zee, supra,* 589 F.2d at 729; *Aalco, supra,* 466 F.2d at 187; *Duncan, supra,* 377 F.2d at 55; *Lind, supra,* 278 F.2d at 91; *Narcisse v. Ill. Central Gulf R. Co.,* 620 F.2d 544, 554 (5th Cir. 1980); *Spurlin v. General Motors Corp.,* 528 F.2d 612, 619-21 (5th Cir. 1976); *Moore v. Schultz,* 491 F.2d 294, 301 (10th Cir. 1974).

Such guidance by this Court is necessary to alleviate the congested dockets which plague litigants and judges alike.

3. This Court Must Occasionally Review a Trial Record to Ensure the Lower Courts Do Not Erase the Right to Trial by Jury

This case presents a needed opportunity for this Court to announce a clear rule governing the award of new trials. Unfortunately, however, the declaration of the proper standard of review may not be sufficient. The courts in the Ninth Circuit are notable for their intrusion upon the Seventh Amendment rights of citizens.[11] The trend is worsening and should be reversed by this Court. The Court should therefore apply the *Lind* standard to the trial record

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[11]See, *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1260 (9th Cir. 1981); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979); *California Computer Products v. International Business Machines*; 613 F.2d 727, 733 n.3 (9th Cir. 1979); *Marquis v. Chrysler Corp.*, 577 F.2d 624, 639 (9th Cir. 1978); *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901 (9th Cir. 1978); *Syufy Enterprises v. Nat'l General Theatres, Inc.*, 1978-1 Trade Cases ¶ 61,996 (9th Cir. 1978); *Fount-Whip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978); *Greyhound Computer v. International Bus. Mach.*, 559 F.2d 488 (9th Cir. 1977); *Santa Clara Valley Distributing v. Pabst Brewing Co.*, 556 F.2d 942 (9th Cir. 1977); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460 (9th Cir. 1977); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976); *Noble v. McClatchy Newspapers*, 533 F.2d 1061 (9th Cir. 1975); *Hilton v. Mumaw*, 522 F.2d 588 (9th Cir. 1975); *England v. Chrysler Corp.*, 493 F.2d 269 (9th Cir. 1974); *Hallmark Industry v. Reynolds Metal Co.*, 489 F.2d 8 (9th Cir. 1973); *Kaplan v. Burroughs Corp.*, 426 F.Supp. 1328 (N.D. Cal. 1977); *Naify v. McClatchy Newspapers*, 1977-2 Trade Cases ¶ 61,558 (N.D. Cal. 1977); *Tomac, Inc. v. Coca Cola Co.*, 418 F.Supp. 359 (C.D. Cal. 1976).

in this case and thereby demonstrate its resolve to vindicate each citizen's right to trial by jury.

If the Seventh Amendment right to jury trial is to have any significance, it must be policed by this Court to set a clear example for the lower federal courts. Litigants and the citizenry at large cherish their constitutional right to a trial by jury. Indeed, the courts extol the sanctity of this privilege. See, e.g., *U.S. Financial Securities, supra,* 609 F.2d at 429-31; *Narcisse, supra,* 620 F.2d at 546. Yet certain district judges, sitting imperiously as a "thirteenth juror," have exercised veto power over the other twelve and have transformed the "right" into an illusion. Inglis is keenly aware this Court does not welcome detailed arguments regarding conclusions which may properly be drawn from evidence presented at trial, but there is no other way to ensure the lower federal courts adhere to the Seventh Amendment.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit insofar as it affirmed the District Court's Order granting Continental a new trial on Inglis' claims under the California Unfair Practices Act, Sherman Act § 2 and Robinson-Patman Act § 2(a).

Respectfully submitted,

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(Appendix E follows)

Appendix E

Determining a Strategy to Combat Private Label Competition In the Bread Market

ITT-Continental Baking Company, Inc.

October 22, 1971

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IV. WILL HOLDING RETAIL PRICES IMPROVE ITT-CONTINENTAL'S COMPETITIVE POSITION?

The Federal Trade Commission has pointed out that "Since World War II, bread prices have risen three times more rapidly than the average for other food products, and bread price increases alone have accounted for nearly one-fifth of the total increase in the price index of food products consumed at home."* Since the time of that report, the price index for white bread has continued to climb rapidly (Exhibit 16). But wholesale bakers have not been the exclusive beneficiaries of these price increases. In fact, beginning about 1960, retailers started taking a growing share of the added revenues coming from retail price increases for bread (Exhibit 17). The fact that price adjustments paid by ITT-Continental to the trade increased 49 percent over the past 5 years suggests that retailers are still taking a significant share of the increased revenue from recent price increases.

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*_Economic Report on the Baking Industries_, Report of the Federal Trade Commission, November 1967.

Presuming that the readiness with which the baking industry has had recourse to price increases has helped sustain less efficient competitors in the past, it seems reasonable to assume that greater reluctance to increase retail prices in the future can significantly improve ITT-Continental's competitive position. The principal issue to be resolved under these circumstances is what will be the impact of a hold-the-price-line strategy on ITT-Continental itself and on its competitors. Specifically, the question is: To what extent is ITT-Continental and each of its competitors capable of holding prices? In answering this question, ITT-Continental must compare itself to its competitors in terms of its current financial strength and either its capability for holding or reducing costs or its willingness to absorb future cost increases by accepting lower profits.

Presuming that ITT-Continental can successfully hold the line on retail prices and also presuming that the outcome of this strategy would be an acceleration in the shakeout of marginal bakeries, ITT-Continental must also assess whether the availability of these bakeries for sale to retailers will foster the further expansion of private label. Obviously, this is not a small consideration since the private label threat is substantial now and ITT-Continental must make every effort to avoid strengthening it further.

Assuming that an aggressive price maintenance strategy passes the tests outlined above, the last issues with which management must deal have the objective of optimizing the beneficial outcome of the strategy. Certainly the first question to be answered is which tactics can be legally employed to reflect cost savings and other operating efficiencies in retail prices. A good deal of legal and government

IV. WILL HOLDING RETAIL PRICES IMPROVE ITT-CONTINENTAL'S COMPETITIVE POSITION?

	Issue	Hypothesis	Analysis/Inquiry	Sources
1.	What would be the impact on ITT-Continental and wholesale competitors of various levels of price reduction?	Lowering prices would significantly reduce profits of ITT-Continental and competitors. However, because ITT-Continental has a broad geographic base and greater financial resources it would be in a better position to weather a price war. More importantly, ITT-Continental could identify individual competitive targets and initiate price reductions on a market-by-market basis, thereby minimizing profit reduction in any one year.	Analysis of the sensitivity of ITT-Continental and competitor's profits to price reductions.	Annual reports.
			Identification of specific competitive targets, markets in which they are most vulnerable, and length of time they could sustain a price war.	Interviews with bakery and headquarters management.
2.	Has ITT-Continental benefited in the past from the exodus of competitive wholesale bakers?	ITT-Continental has benefited by attrition of wholesale bakers. However, in some cases private label has been the beneficiary as chains have purchased closed facilities.	Analysis of ITT-Continental's volume before and after closing of competitive wholesale bakeries.	Company records.
			Disposition of facilities wholesale bakers have closed.	Interviews with bakery and headquarters management.
3.	Could price-reduction strategy be followed without creating a	Government could construe pricing activities to be attempts to monopolize.	Identification of legal risks.	ITT-Continental l[illegible]al department.

consultation will clearly be necessary here to ensure that ITT-Continental's strategies are legally consistent with the government's policy of holding down inflationary price increases. If legal and other constraints permit only a national approach, the issue is then largely one of identifying pricing objectives and the cost/profit consequences of holding prices over time. If more local pricing flexibility is possible, market-by-market objectives must be evaluated and selected and action plans and coordinated programs designed to achieve those objectives.